Supreme Court, U.S.
FILED

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No. _____

In the
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

Karen Elizabeth Dempster, Petitioner,

v.

Municipality of Anchorage; LeJane Ferguson, Municipal Clerk; William A. Greene, Assistant Municipal Attorney; and John Doe 1 and John Doe Parties, Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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April 8, 1997

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QUESTIONS PRESENTED

(1) Is the First Amendment right of a citizen to sign her name to an application for a recall petition without being sued by the very government body delegated to receive the petition of such imperative pubic importance, in this case of first impression, that this court should review the appellate court's denial of interlocutory jurisdiction and provide interlocutory access to the appellate system for citizen voter plaintiffs where a district court has applied due process rather than the higher standard First Amendment case law when granting qualified immunity to government defendants?

(2) Should this court let stand a decision of first impression from a lower federal court that is now the only operative federal decision on an issue previously so well settled, that since the adoption of the First Amendment in 1791 and the disavowal and abandonment of the Sedition Act of 1798, has a government entity sued its citizens for exercising their right to sign their names to an application for a recall petition and where the lower federal court opinion decided this important federal question in a way that conflicts with long-standing and relevant First Amendment, strict scrutiny and voter rights decisions of this court?

(3) Should this court protect government defendants from litigation under 42 U.S.C. § 1983 by extending jurisdiction for the appellate courts to hear interlocutory appeals on the issue of qualified immunity arising under due process and police function questions by adding this protective dimension to its interpretation of 28 U.S.C. § 1291 and then fail to extend to plaintiffs the same access for protection when the issue is voter rights under the First Amendment and directly on point with the original purpose of 42 U.S.C. § 1983?

(4) Should this court recognize the chilling effect of being sued on government officials by finding a public interest in protecting them in certain cases by qualified immunity, yet see no chilling effect on public interest on the right to petition when citizens are sued for signing their names to a petition?

LIST OF PARTIES

From the filing of her original complaint in the United States District Court for the District of Alaska, to the interlocutory appeal on the issue of qualified immunity before the United States Court of Appeals for the Ninth Circuit, to the motion for reconsideration before the United States Court of Appeals for the Ninth Circuit, the plaintiff/appellant/petitioner has been Karen Elizabeth Dempster, who represented herself *pro se*.

Before the United States District Court for the District of Alaska and before the United States Court of Appeals for the Ninth Circuit, for both the interlocutory appeal on the issue of qualified immunity and the motion for reconsideration, the defendants/appellees/respondents have been the Municipality of Anchorage; LeJane Ferguson, Municipal Clerk; William A. Greene, Assistant Municipal Attorney; John Doe 1; and John Doe parties to be identified though discovery. Before both the United States District Court for the District of Alaska and the United States Court of Appeals for the Ninth Circuit, all defendants/appellees have been represented by Cliff John Groh, Assistant Municipal Attorney.

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IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

PETITION FOR A WRIT OF CERTIORARI

Petitioner Karen Elizabeth Dempster respectfully requests that a writ of certiorari issue to review the Judgment and Order of the United States Court of Appeals for the Ninth Circuit entered on January 17, 1997, in Karen Elizabeth Dempster, Plaintiff-Appellant, v. the Municipality of Anchorage, et al., Defendants-Appellees.

OPINIONS BELOW

The Judgment and Order of the United States Court of Appeals for the Ninth Circuit dismissing the appeal issued January 17, 1997, and the Order issued January 10, 1997, are unpublished. They are reprinted in the appendices herein, pp. 1a and 3a *infra*.

The Order of the United States Court of Appeals for the Ninth Circuit issued on September 30, 1996, is unpublished. It is reprinted in the appendices herein, p. 5a *infra*.

The Opinion and Order on Motion to Dismiss of the United States District Court for the District of Alaska, issued on July 15, 1996, is unpublished. It is

reprinted in the appendices herein, p. 6a *infra*.

JURISDICTION

On March 7, 1996, Petitioner Karen Elizabeth Dempster filed a complaint against Alaska municipal officials, in their individual and official capacities, in the United States District Court for the District of Alaska under 42 U.S.C. § 1983, alleging, *inter alia*, violations of her First, Ninth and Fourteenth Amendment rights under the United States Constitution.

On July 15, 1996, the District Court for the District of Alaska filed its Opinion and Order on the defendant Municipality of Anchorage's Motion to Dismiss, granting in part and dismissing in part. Appendices 6a. Defendants Greene and Ferguson, who were the Assistant Municipal Attorney and Municipal Clerk, respectively, for the Municipality of Anchorage (MOA), were granted qualified immunity and dismissed from the suit in their individual capacities.

On August 13, 1996, Petitioner Dempster filed a timely notice of appeal to the Ninth Circuit on the issue of granting qualified immunity.

On September 30, 1996, the United

States Court of Appeals for the Ninth Circuit filed an order dismissing the appeal for lack of jurisdiction, citing Fed. R. Civ. P. 54(b) and a Federal Tort Claims Act case. Appendices 5a.

On October 8, 1996, Petitioner Dempster filed a non-opposed motion for reconsideration based upon plain error.

On January 17, 1997, the United States Court of Appeals for the Ninth Circuit entered a Judgment, based on its January 10, 1997 Order, dismissing the appeal for lack of jurisdiction, citing *Mitchell*. Appendices 1a and 3a.

Jurisdiction for this Court to hear an appeal from a final order or judgment of a court of appeals is found under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Magna Carta: *The Magna Carta* (1215), (Translation of Cii, Bemont 1892, pp. 26-39) in J. C. Holt, *Magna Carta* (1992).

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> Section 61. Since, moreover, we have granted all the aforesaid things for God, for the reform of our realm and the better settling of the

quarrel which has arisen between us and our barons, wishing these things to be enjoyed fully and undisturbed in perpetuity, we give and grant them the following security: namely, that the barons shall choose any twenty-five barons of the realm they wish, who with all their might are to observe, maintain and cause to be observed the peace and liberties which we have granted and confirmed to them by this our present charter; so that if we or our justiciar or our bailiffs or any of our servants offend against anyone in any way, or transgress any of the articles of peace or security, and the offence is indicated to four of the aforesaid twenty-five barons, those four barons shall come to us or our justiciar, if we are out of the kingdom, and shall bring it to our notice and ask that we have it redressed without delay. ....

*****

First Amendment to the Constitution of the United States.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably

to assemble, and to petition the Government for a redress of grievances.

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Sedition Act of 1798, Sec. 2: 1 Stat. at Large 596.

> *And be it further enacted*, That if any person shall write, print, utter or publish, or shall cause or procure to be written, printed, uttered or published, or shall knowingly and willingly assist or aid in writing, printing, uttering or publishing any false, scandalous and malicious writing or writings against the government of the United States or either house of the Congress of the United States, or the President of the United States, with intent to defame the said government, or either house of the said Congress, or the said President, or to bring them, or either of them, into contempt or disrepute; or to excite against them, or either or any of them, the hatred of the good people of the United States, or to stir up sedition within the United States, or to excite any unlawful combinations therein, for opposing or resisting any law of the United States, or any act of the President of the United States, done in pursuance of any such law, or of

the powers in him vested by the constitution of the United States, or to resist, oppose, or defeat any such law or act, or to aid, encourage or abet any hostile designs of any foreign nation against the United States, their people or government, then such person, being thereof convicted before any court of the United States having jurisdiction thereof, shall be punished by a fine not exceeding two thousand dollars, and by imprisonment not exceeding two years.

*****

Ninth Amendment to the Constitution of the United States.

The enumeration in the Constitution of certain rights, shall not be construed to deny or disparage others retained by the people.

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Fourteenth Amendment to the Constitution of the United States, Section 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which

shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

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42 U.S.C. § 1983. Civil action for deprivation of rights.

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory of the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privilege, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceedings for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia. (R. S. § 1979; Dec. 29, 1979, P. L. 96-170, § 1, 93 Stat. 1284.)

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The Constitution of the State of Alaska, Article I

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Section 2 - Source of Government

All political power is inherent in the people. All government originates with the people, is founded upon their will only, and is instituted solely for the good of the people as a whole.

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Section 6 - Assembly; Petition.

The right of the people peaceably to assemble, and to petition the government shall never be abridged.

*****

The Constitution of the State of Alaska, Article XI, Section 8 - Recall.

All elected public officials in the State, except judicial officers, are subject to recall by the voters of the State or political subdivision from which elected. Procedures and

grounds for recall shall be prescribed by the legislature.

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Anchorage Municipal Charter § 17.07. Oaths of office.

> Municipal officers, before taking office, shall take and subscribe to the following oath or affirmation: "I solemnly swear (or affirm) that I will support and defend the Constitution of the United States, the Constitution of the State of Alaska and the Charter of Anchorage, and that I will faithfully perform the duties of _____ to the best of my ability."

STATEMENT OF THE CASE

In January of 1994 two MOA assembly members were running for mayor of Anchorage in the April 1994 municipal elections. One of the assembly member mayoral candidates determined that an upcoming citizen advisory ballot issue, championed by his assembly member opponent, would bring out a large number of voters, who would be unfavorable to his candidacy.

The advisory ballot issue was the outgrowth of a tumultuous school district action taken against the weight of parent

testimony and compromise, after days of hearings in January 1994. This politician called a hasty meeting with another assembly member, three school board members and the school superintendent. The meeting had less than 24 hours notice, and was held in the private office of his brother and campaign manager[1].

Thereafter the officials present successfully derailed the advisory ballot. Indignant citizens, who had already been thwarted in expressing their concern to their school board members, were now without a voice through the advisory ballot.

These citizens went to the state and municipal ombudsmen and other assembly members who all gave consistent advice: recall was the only avenue to register their dissatisfaction.

Following preparation advice from the MOA clerk's office, fourteen qualified voters signed and submitted an application for recall of the recall-qualified elected

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[1]A statutorily deficient notice announcing the meeting (appendix 31a) went out on MOA E-Mail at 4:22 P.M. Friday, January 21, 1994, for the Saturday, January 22, 1994, meeting at 2:00 P.M. (Alaska Stat. §§ 44.62.310, 44.62.312, Anchorage Municipal Code § 1.25.010, Anchorage School District Policy 163.1&2 and Alaska Attorney General's opinion no. 663-93-0203.)

officials present at the January 22, 1994, meeting.[2]

By statute, and past practice, the clerk either accepts or rejects an application using statutory guidelines. If the clerk rejects the application, the defects are noted, allowing the sponsors to either abandon or challenge the process or correct the defects and the recall process would go forward.

In Anchorage, the municipal clerk is directly responsible to, and supervised by, the municipal assembly. On March 7, 1994, Respondent Clerk Ferguson returned the original February 17, 1994, application (appendix 32a) with notation for correction. On March 14, 1994, corrected applications were resubmitted to the clerk's office (appendix 34a-37a).

Between the time the applications were returned to the signers and the time they were resubmitted and received by the clerk, the MOA filed a declaratory judgment action naming all the signers of the application as defendants. This Strategic Lawsuit Against Public Participation (SLAPP) had not yet been

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[2] Alaska Stat. § 29.26.290(a) states that elected officials cannot be recalled if they are within 180 days of the end of their terms. One school board member at the meeting was so positioned.

served on the original application signers.

The legal action derailed the application process and killed the petition. The petition signers who were served summonses were stunned, frightened and confused. None could believe that their government sued them for signing an application for a recall petition. Most swore that they would never get involved in the political process again.

Petitioner Dempster hired an attorney to fight the SLAPP suit from the Superior Court to the Alaska Supreme Court and back to the Superior Court, at a cost of $10,000. The federal right to petition was not vindicated by the state courts, and, less than a year later, the MOA again sued its citizens, this time for requesting a ballot referendum.

Although the same state court judge heard both cases, he now reversed himself by chastising the MOA for suing the petition signers and trampling on their constitutional right to petition. (Appendix 38a) The assembly candidate who called the secret Saturday meeting lost the election for mayor, but the parents who originally raised the advisory ballot concern with the school district never had their grievances redressed.

On March 7, 1996, Petitioner Dempster filed a complaint with the United States District Court for the District of Alaska (District Court) under 42 U.S.C. § 1983 On April 10, 1996, Respondents answered and then filed a Motion to Dismiss all Claims Based on Failure to State a Claim and a Motion to Dismiss Claims Against Defendants LeJane Ferguson and William A. Greene in their Individual Capacities Based on Qualified Immunity (motion). Petitioner Dempster filed an Opposition to Motion to Dismiss on April 26, 1996. Respondents filed a reply on May 6, 1996.

The District Court ruled on the motion on July 15, 1996, stating in part on page 9 of the opinion (Appendix 6a) that:

> "[t]here is no case law holding that the right to petition encompasses the right not to be named as a defendant in a declaratory judgment action..."

and that

> "[t]he alleged constitutional right to petition the government without being the subject of a declaratory action is not explicitly or necessarily a part of the constitutional right to petition the government, nor is such an alleged right not to be sued so clearly

implicit in the right of petition as to render officials subject to possible individual responsibility for bringing a declaratory action against a petitioner.

Defendants Ferguson and Greene are therefore dismissed in their individual capacities."

Petitioner Dempster then filed an Appeal to the United States Court of Appeals for the Ninth Circuit on an interlocutory basis, asking for a review of the grant of qualified immunity. The appeal and motion for reconsideration were denied because, under current case law, only a defendant can appeal the denial of qualified immunity on an interlocutory basis.

THE WRIT OF CERTIORARI SHOULD ISSUE IN THIS CASE OF FIRST IMPRESSION TO RESOLVE CONSTITUTIONAL DANGERS TO THE FUNDAMENTAL FIRST AMENDMENT VOTER RIGHT TO PETITION BY PERMITTING AN INTERLOCUTORY APPEAL ON THE ISSUE OF QUALIFIED IMMUNITY BY A FIRST AMENDMENT VOTER PLAINTIFF

A. Introduction

Since the adoption of the First Amendment in 1791, there have been no federal court decisions on whether or not a state or local government can sue its

citizens for bringing forward an application for a recall petition. This is not because the law is unclear but because the law is so well established.

Petitioning holds an ancient and sacred place in the Anglo-American constitutional system, beginning with the signing of the Magna Carta in 1215 A.D. Petitioning predated the other rights of expression, assembly, press and speech, and has been afforded greater, not lesser, protection by this Court than these other first amendment expressive rights.

Clear court support for petitioning's protected position came from the American experience with the Sedition Act of 1798, which, in Justice Brennan's words, "first crystallized a national awareness of the central meaning of the First Amendment." Justice Brennan in *New York Times v. Sullivan* 376 U.S. 254, 273 (1964). The Sedition Act, which had a built-in two-year expiration period, was never challenged in court because the force of public opinion, rather than congressional or judicial action, extinguished it. Sedition Act of 1798, Sec. 4. 1 Stat. at Large 596.

The public knew then, as the public knows now, that being sued for signing your name to an application for a recall petition is an abridgment of the right to

petition. The first amendment right to petition is clear, and the action taken by the Respondents abridging that right is clear. Respondents, named and unnamed, should be held accountable for their actions in abridging petitioners' rights. 42 U.S.C. § 1983 provides the mechanism to hold the Respondents accountable.

B. Is the First Amendment right of a citizen to sign her name to an application for a recall petition without being sued by the very government body delegated to receive the petition of such imperative pubic importance, in this case of first impression, that this court should review the appellate court's denial of interlocutory jurisdiction and provide interlocutory access to the appellate system for citizen voter plaintiffs where a district court has applied due process rather than the higher standard First Amendment case law when granting qualified immunity to government defendants?

In our constitutional democracy, the government proceeds directly from the people. Our government authority derives its powers from the Constitution which was constructed by the people meeting in convention and then submitting their proposed constitution back to the people for ratification. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 403-06 (1819). The Founding Fathers decided that the

right to petition was important enough to be unabridged and named specifically in the First Amendment.

When a government official comes into conflict with Constitutional guarantees "[s]he is stripped of [her] official representative character and is subjected in [her] person to the consequences of [her] individual conduct." *Ex parte Young*, 209 U.S. 123, 160 (1908). A reasonably competent public official should know the law governing her conduct, and certainly the First Amendment right to petition, especially when that official is the city clerk in charge of elections. That official has the burden of proof if the official raises qualified immunity. *Harlow v. Fitzgerald*, 457 U.S. 800, 808 (1982), and *Nixon v. Fitzgerald*, 457 U.S. 731, 747 (1982).

Political expression lies at the core of First Amendment values. *Buckley v. Valeo*, 424 U.S. 1, 14-15 (1979). This Court determined that the right of suffrage is a fundamental matter in a free and democratic society. *Buckley*, at 57. The denial of constitutionally-protected rights "demands judicial protection; our oath and our office require no less of us". *Reynolds v. Sims*, 377 U.S. 533, 566 (1964). Especially since the "right to exercise the franchise in a free and unimpaired manner is preservative of other

basic civil and political rights", "any infringement of the right of citizens to vote must be carefully and meticulously scrutinized". *Reynolds*, at 562. The court had used the same language in 1886 when describing the political franchise of voting as a fundamental political right "because it is preservative of all other rights". *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886). That court warned that, when looking at institutions of government, they would be wary of personal and arbitrary power, especially the power to grant or withhold a fundamental right like petitioning. *Yick Wo*, at 369-70.

Voting rights are of such imperative public importance that even if government is pursuing a legitimate government interest, it must pursue that interest in such a way that is not overly broad or that does not unnecessarily restrict a constitutionally-protected liberty, like petitioning. *Illinois State Board of Elections v. Socialists Workers Party*, 440 U.S. 173, 184 (1979), *Williams v. Rhodes*, 393 U.S. 23, 30-31 (1968), and *Griswold v. Connecticut*, 381 U.S. 479, 482-83, 486-91 (1965).

This court has declared that the freedom of speech, protected from abridgment by the First Amendment, is among the fundamental personal rights and liberties protected by the Constitution.

Gitlow v. New York, 268 U.S. 652, 660 (1925). Fundamental rights may not be abridged because they are fundamental and may only be restricted by a "clear and imminent danger of some substantive evil" which the government may seek to prevent. *Whitney v. California*, 274 U.S. 357, 373 (1927), overruled by *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (establishing more protective First Amendment rights)

Our nation's founders recognized that governing majorities may result in tyrannies, so they amended the Constitution so that free speech and assembly should be guaranteed. *Whitney*, at 376. The dominant purpose of the First Amendment was to prohibit the widespread practice of suppression of embarrassing information. *New York Times Co. v. United States*, 403 U.S. 713, 716-20 (1971). And hitting very close to home, "a municipality may not empower its...officials to roam...at will dispensing or withholding permission to speak [or petition] according to their own opinions...." *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 150-53 (1969).

The First Amendment places a higher burden on the government to show a compelling and significant reason for any restriction on one of its rights. The rights of suffrage and petition require elevated scrutiny of any governmental

interference because it is so preservative of all our other liberties and necessary for governmental accountability.

The right of petition is an issue of imperative public importance because it strikes at the heart of our constitutional representative democracy.

C. Should this court let stand a decision of first impression from a lower federal court that is now the only operative federal decision on an issue previously so well settled, that since the adoption of the First Amendment in 1791 and the disavowal and abandonment of the Sedition Act of 1798, has a government entity sued its citizens for exercising their right to sign their names to an application for a recall petition and where the lower federal court opinion decided this important federal question in a way that conflicts with long-standing and relevant First Amendment, strict scrutiny and voter rights decisions of this court?

The decision of the United States District Court for the District of Alaska granting qualified immunity was not made by applying the guarantees of stringent protection for the First Amendment right of petition as set down by this Court over the past 200 years. Without interlocutory review this decision stands as the only,

albeit aberrant, decision on the limitations government can place on the right to petition.

The municipal clerk respondent was the employee of two targets of recall. The district court has given this employee and her elected supervisor an excuse not to understand the law, and tie up the petition process, any time a petition application is presented that is not to their liking. This is a prior restraint. *Freedmen v. Maryland*, 380 U.S. 51, 56, 58, 60 (1965).

This Court has opposed prior restraint when it occurred in the censorship of commercial movies, much less when the restriction falls on a fundamental right preservative of all other rights. This Court has opposed tyrannies of governmental majorities when they look for excuses to prohibit guaranteed rights.

This Court has, therefore, been the only hope of citizens who are faced with rights denied by excuses cloaked in law and tyrannies excused as necessary reasonableness or efficiency. This Court, by granting Certiorari, can determine whether or not the District Court's holding that

"the alleged constitutional

> right to petition the government without being the subject of a declaratory action is not explicitly or necessarily a part of the constitutional right to petition the government...."

shall stand as the law of this land or the two hundred years of case law to the contrary shall stand.

D. Should this court protect government defendants from litigation under 42 U.S.C. § 1983 by extending jurisdiction for the appellate courts to hear interlocutory appeals on the issue of qualified immunity arising under due process and police function questions by adding this protective dimension to its interpretation of 28 U.S.C. § 1291 and then fail to extend to plaintiffs the same access for protection when the issue is voter rights under the First Amendment and directly on point with the original purpose of 42 U.S.C. § 1983?

42 U.S.C. § 1983 sprang from governmental tyrannies of a defeated majority following the Civil War. The defeated majority hoped to keep blacks and white Republicans in line. 42 U.S.C. § 1983 was proposed as a right of action with remedial powers. *A Section 1983 Civil Rights Anthology* (Sheldon H. Nahmod ed., 1993), pp. 4 & 149. Citizens could

sue if government denied them a constitutional right under the color of law.

In the 1960's due process and police function questions predominated in 42 U.S.C. § 1983 actions. Government officials were having their ardor dampened by fear of being sued when it was not clear that they had broken any law. *Harlow v. Fitzgerald*, 457 U.S. 800, 814 (1982), and *Mitchell v. Forsyth*, 472 U.S. 511, 517 (1985). Officials who were faced with litigation that they need not face had a legitimate public policy need to have the decision to exclude them from litigation made early and before discovery, so that they would be out of the suit and free to attend to their official business. Through the use of the Cohen collateral issue test, a narrow exception to 28 U.S.C. § 1291 final decision was carved out by this Court. *Mitchell*, at 524. Public officials who did not need to stand trial could not be made whole if they stood trial and later appealed. The damage was done. Defendants placed in or taken out of litigation by virtue of qualified immunity is a final decision; therefore, it is appealable.

Petitioner is asking this Court to carve out a companion exception to 28 U.S.C. § 1291. A First Amendment voter

rights plaintiff needs to hold a government defendant accountable for chilling petition rights as these rights operate to preserve all other rights. If government officials only face limited official liability for their acts against the right to petition and suffrage, rather than personal and punitive liability, it becomes viable to shut down legal opposition and pay the compensatory damages from the public till while making an apology for not knowing their actions were inappropriate. Public policy seems to ask for more. 42 U.S.C. § 1983 guaranteed more.

Without interlocutory review, and therefore an early decision on qualified immunity, some of those who denied a heretofore protected and fundamental First Amendment right will not be included in the litigation when they should be, and those who are will only face official, not personal, liability. This is contrary to the original purpose of 42 U.S.C. § 1983, which is to protect politically active plaintiffs and afford them a meaningful remedy for the harm defendants caused to their rights.

E. Should this court recognize the chilling effect of being sued on government officials by finding a public interest in protecting them in certain cases by qualified immunity, yet see no chilling

effect on public interest on the right to petition when citizens are sued for signing their names to a petition?

The exception to 28 U.S.C. § 1291 was motivated by the need to let government officials out of a suit early, if they were clearly not at fault. This public policy reason was expressed as the wish not to "dampen the ardor of all but the most resolute" public official at the prospect of facing needless legal action. *Harlow*, at 814. "[T]he threat of liability must not deter an official's willingness to execute his office with the decisiveness and judgment required by the public good." *Scheuer v. Rhodes*, 416 U.S. 323, 340 (1974), quoted by *Smith v. Wade*, 461 U.S. 30, 88 (1983).

If public officials with the might of the government, the amassed money of the people, and free access to legal representation can have their ardor chilled, what about the individual petition signer? Citizens who sign their names to a petition which can result in their being named in a law suit, who only have their own financial resources to count on and have little to no familiarity with the judicial process, are certainly going to have their ardor chilled.

Petitioning, although guaranteed by the Constitution, will no longer be an

option. Public policy demands more. The public good, and constitutional survival, demands more. Good government demands more.

The reasons for an early analysis of qualified immunity are compelling and proper. The ability for a government defendant to question this analysis on interlocutory appeal is proper. This Court is now asked to decide whether or not there are equally compelling public policy and constitutional reasons to protect the right to petition government in the suffrage context by extending the right to interlocutory review to a First Amendment voter rights plaintiff.

F. Summary

In order to protect one of the most fundamental rights necessary for our constitutional government, the right to petition government, and to provide an avenue for review when this right is involved, the writ of certiorari must be issued for any one of the reasons set forth above.

CONCLUSION

For the foregoing reasons, the petitioner requests that a writ of certiorari issue to the Ninth Circuit

Court of Appeals to provide relief sought by the petitioner.

Respectfully submitted,

Bruce Comly French
Counsel for Petitioner
7174 Fort Amanda Road
Lima, Ohio 45806-9331
(419) 222-6360
(419) 222-6268 (Facsimile)

JUDGMENT
= =

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

- - - - - - - -

No. 96-35892
CT/AG#: CV-96-00083-HRH

KAREN ELIZABETH DEMPSTER,

Plaintiff - Appellant

v.

MUNICIPALITY OF ANCHORAGE; LEJANE FERGUSON, Municipal Clerk; WILLIAM A. GREEN, Assistant Municipal Attorney

Defendants - Appellees

- - - - - - - - - - - - -

APPEAL FROM the United States District Court for the District of Alaska (Anchorage).

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the appeal in this cause be, and hereby is dismissed.

Filed and entered - 9/30/96.

A TRUE COPY
CATHY A. CATTERSON
Clerk of Court
ATTEST
Jan 17 1997
by: /s/
Deputy Clerk

A96-0083-CV (HRH)
- - - - - - - - - - - - - - - -
C. GROH, II (MUNI-ANCH)
K. DEMPSTER
Judge Holland

Office of the Clerk
United States Court of Appeals for the
Ninth Circuit
95 Seventh Street, P. O. Box 193939
San Francisco, CA 94119-3939

January 17, 1997

USDC, Anchorage
District of Alaska (Anchorage)
222 W. 7th Avenue
Anchorage, AK 99513

C.A. NO.	TITLE	AGENCY/ D.C. NO.
96-35892	Dempster v. Municipality of Anc	CV-96-00083-HRH

Dear Clerk:

The following document(s) in the above listed cause(s) is (are) being sent to you under cover of this letter. Counsel are being served with a copy of this letter only.

[ ] Certified copy of the Decree of the Court
[ ] Judgment of the National Labor Relations Board
[x] Certified copy of the Entry of Dismissal

The record on appeal will follow under separate cover.

Please acknowledge receipt on the enclosed copy of this letter.

Very truly yours,

Cathy A. Catterson
Clerk of Court
/s/
by: Donna Gilmour
Deputy Clerk

Enclosure(s)
cc: ALL COUNSEL, WITHOUT ENCLOSURES

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Filed
Jan 10 1997

KAREN ELIZABETH DEMPSTER,	No. 96-35892
Plaintiff-Appellant,	DC# CV-96-00083-HRH
vs.	Alaska (Anchorage)
MUNICIPALITY OF ANCHORAGE, et al.,	ORDER
Defendants-Appellees.	

Before: FLETCHER, BRUNETTI and NOONAN, Circuit Judges

Appellant's motion for reconsideration of this court's September 30, 1996 order dismissing this appeal for lack of jurisdiction is denied. See Mitchell v. Forsyth, 472 U.S. 511 (1985) (to vindicate defendant's right not to be put to burden of trial, order denying qualified immunity to defendant is subject to interlocutory appeal).

No motions for reconsideration, rehearing, clarification, stay of the mandate, or any other submissions shall be filed or entertained in this closed docket.

PSMiscMemos 10/96/sg

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Filed
Sep 30 1996

KAREN ELIZABETH DEMPSTER,	No. 96-35892
Plaintiff-Appellant,	DC# CV-96-00083-HRH
vs.	Alaska (Anchorage)
MUNICIPALITY OF ANCHORAGE, et al.,	ORDER
Defendants-Appellees.	

Before: FLETCHER, BRUNETTI and NOONAN, Circuit Judges

A review of the record demonstrates that this court lacks jurisdiction over this appeal because the order challenged in the appeal is not final or appealable. See Fed. R. Civ. P. 54 (b); Chacon v. Babcock , 640 F.2d 221 (9th Cir. 1981) (order is not appealable unless it disposes of all claims as to all parties). Consequently, this appeal is dismissed for lack of jurisdiciton.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

Filed Jul 15 1996

KAREN ELIZABETH DEMPSTER,

Plaintiff,

vs.

MUNICIPALITY OF ANCHORAGE, et al.,

Defendants.

No. A96-0083-CV (HRH)

ORDER

Motion to Dismiss

The Municipality of Anchorage ("Municipality"), LeJane Ferguson, municipal clerk, and William A. Greene, assistant municipal attorney, defendants herein, have filed a motion to dismiss this action or, in the alternative, to dismiss the claims against defendants Ferguson and Greene in their personal capacities.[1] This motion is opposed by pro se plaintiff Karen Dempster.[2] Oral argument is not requested and is not deemed necessary.

This action is a direct consequence of a dispute over placing a book concerning sex education in a local elementary school

[1] Clerk's Docket No. 5.

[2] Clerk's Docket No. 8.

library. Plaintiff alleges that on January 10, 1994, the Municipality of Anchorage School District Board voted 5-2 to keep the book on the shelves. Complaint at ¶ 8. Two compromises were offered by those opposed to the book. Id. These compromise votes were defeated at a later meeting on January 12, 1994, again on a 5-2 vote. Id. The concerned parents sought the help of the Municipality of Anchorage Assembly members. Assembly member Campbell agreed to sponsor a non-binding advisory vote on the appropriateness of the book, which would appear on the Aril 19, 1994 ballot. Id. at ¶ 10.

The Municipality of Anchorage Assembly held a January 18, 1994, meeting. Id. at ¶ 11. The merits of a non-binding advisory vote were discussed and a vote postponed so that an assembly member could read the book. Id. at ¶¶ 12-13. At the January 18, 1994, meeting, an assembly member argued that the advisory vote would be of little value, and that parents should either vote the school board members out of office or use the recall. Id. at ¶ 13.

Assembly member Begich sent out an e-mail on the Municipality computer on Friday, January 21, 1994. This e-mail called for a January 22, 1994, meeting to discuss the school board issue. Id. at ¶ 14. There was no public notice of this meeting and the meeting was held in the private office of a relative of an assembly member. Id. at ¶¶ 14-15. Two assembly members, three members of the school board, and the Anchorage School District Superintendent Robert Christal attended the January 22, 1994,

meeting. During that meeting, Christal formulated an idea to have a community-wide survey instead of an advisory vote. Id. at ¶ 17. This item was placed on the agenda of the January 24, 1994, school district meeting.

On February 3, 1994, plaintiff filed a complaint with the state and municipal ombudsmen's offices concerning the January 22, 1994, meeting. Both informed plaintiff that her only recourse was a recall. Id. at ¶ 18. Mrs. Kriste Lower sought the advice of the municipal clerk for recall procedure and obtained previously approved recall petitions. Id. at ¶ 19. A recall petition was formalized, publicly circulated for signatures, and filed on February 17, 1994. Plaintiff was a signatory to a recall petition which claimed the January 22, 1994, meeting was a violation of state laws and regulations. On March 1, 1994, defendant Greene sent a memo to defendant Ferguson suggesting that a declaratory action be filed to determine the legal sufficiency of the recall petition. Plaintiff and other signatories of the recall petition were named defendants in a state court declaratory action, which was filed on March 8, 1994. Neither party has indicated the status of this lawsuit. Plaintiff incurred $10,000 in legal fees. Id. at ¶ 40.

Plaintiff claims the suit filed against her chills her ability to call public officials to account and that such is a violation of the First and Fourteenth Amendments of the United States Constitution. Id. at ¶¶ 49-50. Plaintiff further charges that Alaska Constitution Article

XI, Section 8, is offended by the filing of the declaratory judgment action. Plaintiff also contends that defendants' actions "constituted an abuse of process." Id. at ¶¶ 54-56. Plaintiff seeks the following: (1) an injunction against the Municipality prohibiting future suits against recall petition signatories; (2) compensatory damages; (3) punitive damages; (4) attorney's fees and costs; and (5) such other relief as this court shall consider fair and equitable.

Defendants seek to have the entire action dismissed or, in the alternative, seek dismissal of the "individual defendants" on the basis of qualified immunity.

The Ninth Circuit has held that pro se plaintiffs in civil rights cases are afforded special treatment. Karim-Panahi v. Los Angeles Police Dept., 839 F.2d 621 (9th Cir. 1988). The court stated:

> In civil rights cases where the plaintiff appears pro se, the court must construe the pleadings liberally and must afford plaintiff the benefit of any doubt. Bretz v. Kelman, 773 F.2d 1026, 1027 n.1 (9th Cir. 1985) (en banc). "A pro se litigant must be given leave to amend his or her complaint unless it is 'absolutely clear that the deficiencies of the complaint could not be cured by amendment.'" [Noll v. Carlson, 809 F.2d 1446, 1448 (9th Cir. 1987)] (quoting Broughton v. Cutter Laboratories, 622 F.2d 458, 460 (9th

> Cir. 1980) (per curium)); accord Eldridge v. Block, 832 F.2d 1132, 1135-36 (9th Cir. 1987). Moreover, before dismissing a pro se civil rights complaint for failure to state a claim, the district court must give the plaintiff a statement of the complaint's deficiencies. Eldridge, 832 F.2d at 1136; Noll, 809 F.2d at 1448-49. "Without the benefit of a statement of deficiencies, the pro se litigant will likely repeat previous errors." Noll, 809 F.2d. at 1448.

Id. at 623-24. Accord, Ferdik v. Bonzelet, 963 F.2d 1258 (9th Cir. 1992).

In her complaint, plaintiff clearly makes a claim under 42 U.S.C. § 1983. She makes the constitutional claims noted above. Plaintiff has not designated the capacity in which she is suing defendants Ferguson and Greene. This court will assume plaintiff meant to bring an action against the above defendants in both their individual and official capacities.

With respect to the factual basis for her complaint, plaintiff, in substance, argues the following:

(1) that defendant Ferguson should have made a decision and let plaintiff decide on the next course of action;

(2) if defendant Ferguson decided the recall petition was suffi-

cient then a recall would take place;

(3) if defendant Ferguson did not find the recall petition sufficient, then plaintiff would have the option of bringing a suit or dropping the matter;

(4) defendant Ferguson, by filing the declaratory action against the petitioners, has removed the plaintiff's option of dropping the matter and subjected her to legal fees; and

(5) the imposition of legal fees has a chilling effect on plaintiff's right to petition.

Plaintiff has sufficiently alleged a cause of action, a Section 1983 claim.

Qualified Immunity

The Ninth Circuit, in Hallstrom v. City of Garden City, 991 F.2d 1473 (9th Cir. 1993), cert. denied, __ U.S. __, 114 S.Ct. 549, 126 L.Ed.2d 450 (1993), stated:

> A municipality (and its employees sued in their official capacities) may not assert a qualified immunity defense to liability under Section 1983. Owen v. City of Independence, [445 U.S. 622, 638 (1980)]; Kentucky v. Graham, [473 U.S. 159, 165-68 (1985)]. Whether the qualified immunity defense applies to the officials ... sued in

> their individual capacities turns on "the 'objective legal reasonableness' of the action assessed in light of legal rules that were 'clearly established' at the time it was taken." Anderson v. Creighton, [483 U.S. 635, 639 (1987) (citing Harlow v. Fitzgerald, 457 U.S. 800, 818-19 (1982)]; see also Davis v. Scherer, [468 U.S. 183, 191 (1984) ("[w]hether an official may prevail in his qualified immunity defense depends upon the 'objective reasonableness of [his] conduct as measured by reference to clearly established law'") (quoting Harlow, 457 U.S. at 818)]. A two-part analysis is required: "(1) Was the law governing the official's conduct clearly established? (2) Under that law, could a reasonable officer have believed that the conduct was lawful?" Act Up!/Portland v. Bagley, 988 F.2d 868, 871-72 (9th Cir. 1993).

Id. at 1482.

The first question in the qualified immunity analysis is "a pure question of law for the court to decide." Mendoza v. Block, 27 F.3d 1357, 1360 (9th Cir. 1994). The Ninth Circuit stated:

> The plaintiff's legal right cannot be so general as to allow a plaintiff to "convert the rule of qualified immunity ... into a rule of virtually unqualified liability

simply by alleging [a] violation of extremely abstract rights." Anderson [v. Creighton, 483 U.S. 635, 639 (1987)]. For example, the Supreme Court in Anderson suggested that although "the right to due process of law is quite clearly established ... and thus there is a sense in which any action that violates [the Due Process Clause] (no matter how unclear it may be that the particular action is a violation) violates a clearly established right," such a general allegation is not enough to overcome a defendant's qualified immunity. Id.

For qualified immunity purposes, a right "must [be] 'clearly established' in a more particularized, and hence more relevant, sense: The contours of the right must be sufficiently clear that [at the time the allegedly unlawful action is taken] a reasonable official would understand that what he is doing violates that right." [Id. at 640]. See also [Romero v. Kitsap County, 931 F.2d 624, 629 (9th Cir. 1991)]. This does not mean that any official action is protected by qualified immunity "unless the very action in question has previously been held unlawful," but it does require that "in the light of pre-existing law the unlawfulness must be apparent." [Anderson, 483 U.S. at 640]. Thus, when "the defendants'

> conduct is so patently violative of the constitutional right that reasonable officials would know without guidance from the courts" that the action was unconstitutional, closely analogous pre-existing case law is not required to show that the law is clearly established. Casteel v. Pieschek, 3 F.3d 1050, 1053 (7th Cir. 1993).

Id. at 1361.

The First Amendment of the Constitution states in pertinent part:

> Congress shall make no law respecting ... the right of the people ... to petition the Government for a redress of grievances.

This right has been incorporated into the Fourteenth Amendment and is therefore applicable to the states. Nicholson v. Moran, 835 F.Supp. 692, 695 (D. R.I. 1993). The right to petition applies "to all departments of the Government." California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508, 510 (1972).

Plaintiff contends that naming a recall petitioner as a defendant in a declaratory suit to determine the validity of the recall petition is a clearly established violation of the federal right to petition and that no state official could reasonably believe that his conduct was lawful.

Defendants claim that there is case law allowing the filing of declaratory actions against a recall petitioner. Defendants point to three cases in which persons or entities who had filed a recall motion were named as defendants in a declaratory action. These cases are Eisenberg v. Committee to Elect Levin, 417 A.2d 1067 (N.J. Super. 1980); Meiners v. Bering Strait School Dist., 687 P.2d 287 (Alaska 1984);[3] and Whitson v. Anchorage, 608 P.2d 759 (Alaska 1980). In each of these cases a petitioner was sued in a declaratory judgment action. The propri-

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[3] In Meiners, he Alaska Supreme Court allowed the Bering Strait School District (BSSD) to bring an action against the state director of elections. BSSD is a "regional educational attendance area" which is governed by a regional school board of eleven elected members. A group of voters in the BSSD petitioned for the recall of all eleven members of the board. The petitioners were concerned over expenditures made by the superintendent. The Division of Elections verified 249 signatures and used the last school board election as the benchmark to determine if the petitioners met the threshold of 25% of the last election. The Lieutenant Governor set an election date. BSSD filed a declaratory action against three petitioners, the Director of Elections, and the Lieutenant Governor. BSSD argued the petitioners needed to meet a threshold of 25% of the electorate at the last regular election, not a school board election, and that portions of the recall were insufficient. The Alaska Supreme Court held the 25% threshold applied to the last election and that any portion of the recall that was sufficient was to go on the ballot.

ety of naming a petitioner as a defendant, however, was not an issue and therefore was not addressed by the courts.

There is no case law holding that the right to petition encompasses the right not to be named as a defendant in a declaratory judgment action to determine the sufficiency of a recall petition. Thus, this court must determine if defendants' conduct is so patently violative of the constitutional right that reasonable officials would know without guidance from the courts that the action was unconstitutional.

The alleged constitutional right to petition the government without being the subject of a declaratory action is not explicitly or necessarily a part of the constitutional right to petition the government, nor is such an alleged right not to be sued so clearly implicit in the right of petition as to render officials subject to possible individual responsibility for bringing a declaratory action against a petitioner.

Defendants Ferguson and Greene are therefore dismissed in their individual capacities.[4] Defendants' motion to dismiss is granted in part and denied in part.

DATED at Anchorage, Alaska, this 15 day of July, 1996.

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[4] This court declines to treat defendant's motion as one for summary judgment.

/s/

H. Russel Holland, Judge
District of Alaska

A96-0083-CV (HRH)

- - - - - - - - - - - - - - - - - -

C. GROH, II (MUNI-ANCH)
K. DEMPSTER

Sec. 29.26.240. Recall. An official who is elected or appointed to an elective municipal office may be recalled by the voters after the official has served the first 120 days of the term for which elected or apppointed.

Sec. 29.26.250. Grounds for recall. Grounds for recall are misconduct in office, incompetence, or failure to perform prescribed duties.

Sec. 29.26.260. Application for recall petition. (a) An application for a recall petition shall be filed with the municipal clerk and must contain

(1) the signatures and residence addresses of at least 10 municipal voters who will sponsor the petition;

(2) the name and address of the contact person and an alternate to whom all correspondence relating to the petition may be sent; and

(3) a statement in 200 words or less of the grounds for recall stated with particularity.

(b) An additional sponsor may be added at any time before the petition is filed by submitting the name of the sponsor to the clerk.

Sec. 29.26.270. Recall petition. (a) If the municipal clerk determines that an application for a recall petition meets the requirements of AS 29.26.260, the clerk shall prepare a recall petition ….

Sec. 44.62.310. Government meetings public. (a) All meetings of a legislative

body, of a board of regents, or of an administrative body, board, commission, committee, subcommittee, authority, council, agency, or other organization, including subordinate units of the above groups, of the state or any of its political subdivisions, including but not limited to municipalities, boroughs, school boards, and all other boards, agencies, assemblies, councils, departments, divisions, bureaus, commissions, or organizations, advisory or otherwise, of the state or local government supported in whole or in part by public money or authorized to spend public money, are open to the public except as otherwise provided by this section. Except for meetings of a house of the legislature, attendance and participation at meetings by members of the public or by members of a body may be by teleconferencing. Agency materials that are to be considered at the meeting shall be made available at teleconference locations. Except when voice votes are authorized, the vote shall be conducted in such a manner that the public may know the vote of each person entitled to vote. The vote at a meeting held by teleconference shall be taken by roll call. This sections does not apply to any votes required to be taken to organize a public body described in this subsection.

(b) If excepted subjects are to be discussed at a meeting, the meeting must first be convened as a public meeting and the question of holding an executive session to discuss matters that come within the exceptions contained in (c) of this section shall be determined by a majority vote of the body. Subjects may not be considered at the executive session except

those mentioned in the motion calling for the executive session unless auxiliary to the main question. Action may not be taken at the executive session.

(c) The following excepted subjects may be discussed in an executive session:

(1) matters, the immediate knowledge of which would clearly have an adverse effect upon the finances of the government unit;

(2) subjects that tend to prejudice the reputation and character of any person, provided the person may request a public discussion;

(3) matters which by law, municipal charter, or ordinance are required to be confidential.

(d) This section does not apply to

(1) judicial or quasi-judicial bodies when holding a meeting solely to make a decision in an adjudicatory proceeding;

(2) juries;

(3) parole or pardon board;

(4) meetings of a hospital medical staff; or

(5) meetings of the governing body or any committee of a hospital when holding a meeting solely to act upon matters of professional qualifications, privileges or discipline.

(e) Reasonable public notice shall be given for all meetings required to be open under this section. The notice must include the date, time, and place of the meeting and, if the meeting is by teleconference, the location of any teleconferencing facilities that will be used. In addition to the publication required by AS 44.62.175(a) in the Alaska Administrative Journal, the notice may be given by using a combination of print and broadcast media.

NOTES TO DECISIONS

"Meeting". — A private meeting between a quorum of the Anchorage Municipal Assembly and a developer to discuss in detail the developer's application for rezoning violated this section; a "meeting" for purposes of the Open Meetings Act includes every step of the deliberative and decision-making process when a governmental unit meets to transact public business. The rezoning ordinance later passed by the assembly that allowed a modified plan of development was therefore held void. Brookwood Area Homeowners Ass'n v. Municipality of Anchorage, 702 P.2d 1317 (Alaska 1985).

Sec. 44.62.312. State Policy regarding meetings. (a) It is the policy of the state that

(1) the governmental units mentioned in AS 44.62.310(a) exist to aid in the conduct of the people's business;

(2) it is the intent of the law that actions of those units be taken openly and that their deliberations be conducted openly;

(3) the people of this state do not yield their sovereignty to the agencies that serve them;

(4) the people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know;

(5) the people's right to remain informed shall be protected so that they may retain control over the instruments they have created;

(6) the use of teleconferencing under this chapter is for the convenience of the parties, the public, and the governmental units conducting the meetings.

(b) AS 44.62.310(c)(1) shall be construed narrowly in order to effectuate the policy stated in (a) of this section and avoid unnecessary executive sessions. (§ 3 ch 98 SLA 1972; am § 4 ch 54 SLA 1985)

9TH CASE of Level 1 printed in
FULL format.
Office of the Attorney General of the
State of Alaska
File No. 663-93-0419
1993 Alas. AG LEXIS 52
July 26, 1993

SYLLABUS:
[*1]

SUBJECT: Application for petition for recall of Yukon Flats REAA school board member

REQUESTBY:

Joseph L. Swanson, Director
Division of Elections

FORMAL OPINION

OPINION:

I. INTRODUCTION

Your predecessor, Charlot Thickstun, requested that this office review an application for a petition to recall a member of the Yukon Flats Regional Educational Attendance Area (REAA) school board to determine whether the application meets technical requirements and states grounds for recall under AS 29.26.250, as required by AS 29.26.260. The application should be denied because it does not substantially meet statutory technical requirements and because its allegations are not sufficient to state grounds for recall. The applicants may correct the technical deficiencies and resubmit an application that states proper grounds.

II. TECHNICAL DEFICIENCIES

Members of an REAA school board are subject to recall in accordance with provisions of the Municipal Code, AS 29.26.240 – AS 29.26.360, "except that the director of elections shall perform the functions of a municipal clerk, the lieutenant governor shall perform the functions of the assembly or council under those sections, and the last regular election is [*2] the last regularly scheduled election held within the regional educational attendance area." AS 14.08.081.

Contents of an application for a recall petition are set out in AS 29.26.260 as follows:

(a) An application for a recall petition shall be filed with the municipal clerk and must contain

(1) the signatures and addresses of at least 10 municipal voters who will sponsor the petition;

(2) the name and address of the contact person and an alternate to whom all correspondence relating to the petition may be sent; and

(3) a statement in 200 words or less of the grounds for recall stated with particularity.

The application states that the undersigned 14 individuals "wish to initiate a recall petition against Ruth A. Crow. . . ." and identifies a contact and alternate contact person. However, the application

provides no addresses of the contact, alternate contact, or other sponsors. The return address on the envelope in which the application arrived at the Division of Elections' Region IV office in Fairbanks includes only a Post Office box number and city, with no name of an individual.

The statute requires that an application for a recall petition include addresses of contact [*3] persons and sponsors. The Division of Elections can determine if contact persons and sponsors are currently REAA voters only if it is provided with the current addresses of the persons who sign the application.

The application should also clearly indicate that the persons signing the application are sponsors of the recall. As we explained in an informal opinion dated January 15, 1991 (no. 663-90-0393), inclusion of this language provides assurance that the persons who sign the application [sic]

do so as sponsors who assume the duties of sponsors in circulating the petition. This is important because, once an application for a recall petition is found to meet the requirements of AS 29.26.260, the petition that is prepared for circulation must include "a statement, with space for the sponsor's sworn signature and date of signing, that the sponsor personally circulated the petition, that all signatures were affixed in the presence of the sponsor, and that the sponsor believes the signatures to be those of the persons whose names they purport to be." AS 29.26.270(a)(6).

The applicants can easily indicate their status as sponsors by substituting the word "sponsor" for the word "initiate" [*4] in the application.

The application is also technically deficient because the statement of the grounds for recall exceeds the statutory limit of 200 words. n1

n1 By our count, the statement of grounds includes 211 words.

Because the application does not provide addresses of contact persons or sponsors, does not indicate the signatories are sponsors of the recall, and includes an over-length statement of grounds for recall, we recommend that the application be denied due to its technical deficiencies.

III. SUFFICIENCY OF ALLEGATIONS

Grounds for recall of an REAA school board member "are misconduct in office, incompetence, or failure to perform prescribed duties." AS 29.26.250.

The application sets out its statement of grounds for recall as follows:

We feel that Ruth A. Crow has failed to perform her prescribed duties as a regional school board member.

We feel that Ms. Crow:

(1) Fails to have full and open communication between board and constituents

and fails to report pertinent information on issues discussed and adopted.

(2) Fails to accurately present concerns of constituents. Has very poor rapport with constituents; consequently only presents personal based [*5] and narrow-scoped views. Presents false and erroneous information to board.

(3) Fails to respond to requests made to verbally present matters of great concern to the board and does not support the local school.

(4) Pubically [sic] defames character of school employees.

(5) Meddles in the private, off-duty lives of employees and immediately reports rumor-laden findings to persons of authority.

(6) Unjustly harrasses [sic] employees while on the job which interferes with the operation of the school.

(7) Fails to enlighten constituents with knowledge gained from meetings, workshops and conferences attended.

(8) Makes independent decisions regarding the needs of students at Circle School.

(9) Is incapable of making sound decisions which would benefits the school students - bases decisions on biased prejudiced and personal views.

(10) Abuses travel and per diem privileges. Uses position for personal monetary gain.

(11) Condemns some employees and students for minor infractions and defends others who have grossly violated rules and job responsibilities.

Based on the decision of the Alaska Supreme Court in Meiners v. Bering Strait School District, 687 P2.d 287 (Alaska 1984) [*6] and on previous opinions of this office reviewing recall applications, we do not believe that any of the allegations are sufficient to state grounds for recall. n2 Several of the allegations might be sufficient, if they were restated with particularity.

n2 We have attached several of our recent opinions for your review. The applicable law is set out on pages 3 -- 4 of the January 15, 1991, informal opinion (no. 663-90-0393). If you decide to deny the application in accordance with our recommendation, it might be helpful to the applicants and to the target official to have copies of these opinions.

For example, the allegations of abuse of travel and per diem privileges and use of position for personal monetary gain (No. 10) might state the ground of "misconduct in office," if the allegations included references to particular instances of unlawful conduct. If the allegation that the board member "presents false and erroneous information to the board" (No. 2) were accompanied by allegations of particular instances, it is pos-

sible that the applicants could state grounds for recall. The allegation of public defamation of school employees (No. 4) might state the ground of "misconduct [*7] in office" if particular defamatory conduct were alleged to have been performed while Ms. Crow performed her duties as a school board member. The allegation of harassment of employees on the job (No. 6) might be sufficient if allegations of particular instances could fairly be read as showing either "misconduct in office" or "failure to perform prescribed duties." It is difficult to envision how a school board member's making of "independent decisions regarding the needs of students" (No. 8) could state grounds for recall, unless there were also particular allegations of unauthorized independent conduct.

Because of their lack of particularity, none of the allegations can fairy be read as stating ground for recall. Therefore, the application should be denied for failure to state grounds for recall.

IV. CONCLUSION

Because of the above-mentioned technical deficiencies and insufficiency of the allegations, we recommend that you deny the application for a recall petition. The applicants may file a corrected application at any time; however, a completed petition may not be filed less that 180 days before the end of the school board member's term of office. AS 29.26.290.

Please [*8] let us know if you need further advice in this matter.

OPINIONBY:
Virginia B. Ragle, Assistant Attorney General

PRINTOUT OF E-MAIL MESSAGE

Appointment Review * Municipality of Anchorage * Fri Jan 21 1994 04:22 PM
OPTION ===>
1 * Add 2 * Edit 3 * Delete 4 * Confirm

SELECTION ===> :

Name: ASSEMBLY CALENDR (Highlighted appointments are unconfirmed)

Sel	Date	From	To	Description
1-Sa	01/22/94	02:00P	03:00P	Assembly/ School Board Issues Meeting: Begich, Wohlforth, Richards, Robinson-Wilson, Ossiander 207 W. Northern Lights Blvd., Suite 106

...

Application for Recall of Charles Wolforth, Mark Begich, Sharon Richards & Peggy Robinson-Wilson

Pursuant to A.S. 29.26.260, the undersigned sponsors apply for a recall petition for assembly members Mark Begich, Charles Wolforth, School Board members Sharon Richards, Peggy Robinson-Wilson for committing misconduct in office by:

1. Participating in an illegal meeting on Saturday 1/22/94, with Debbie Ossiander and Superintendent Robert Crystal, in violation of AS44.62.310 (a),(b),&(c), AS44.62.312(a), AMC1.25.010 and ASD policy 163.1 & 163.2.

2. Assemblyman Mark Begich personally requested the following placed on E mail:
    1. Sa 01/22/94 0200p 0300p Assembly/School Board Issues Meeting: Begich, Wohlforth, Richards, Robinson-Wilson, Ossiander, 207 W. Northern Lights Blvd, Suite 106.

3. Such a posting is not timely or public since the "notice" occurred lest than 24 hours prior to the meeting. E-mail "posting" does not constitute public notice under AS 44.62.310(e).

4. The meeting was held in the small private office away from the public eye thus denying the community the right to attend and be heard

on an extremely controversial issue.

5. No official transcript or documentation was memorialized at this meeting further denying public access to the deliberative process of its elected officials.

Clerk's Office
Feb 17 3 41 PM '94

APPLICATION FOR RECALL PETITION
February 17, 1994

As per Section 29.26.260 of the Alaska Statutes the individuals listed herein apply to act as petition sponsors in the recall of the following individuals:

Mark Begich-Assemblymen
Charles Wolforth-Assemblymen
Sharon Richards-Anchorage
School Board President
Peggy Robinson Wilson-Anchorage
School Board Member

Sponsors Name Print Name Address Phone

(14 signers)

Application for Recall of Sharon Richards

Pursuant to A.S. 29.26.260, the undersigned sponsors apply for a recall petition for School Board Member Sharon Richards for committing misconduct in office/failure to perform prescribed duties by:

1. Participating in an illegal meeting on Saturday 1/22/94, with Debbie Ossiander, Peggy Robinson-Wilson, Charles Wohlforth, Mark Begich and Superintendent Robert Christal, in violation of AS 44.62.310(a),(b),&(c), AS44.62.312 (a) and ASD policy 163.1 & 163.2.

2. Assemblyman Mark Begich personally requested the following placed on E mail:
    1. Sa 01/22/94 0200p 0300p Assembly/School Board Issues Meeting: Begich, Wohlforth, Richards, Robinson-Wilson, Ossiander, 207 W. Northern Lights Blvd, Suite 106.

3. Such a posting is not timely or public since the "notice" occurred lest than 24 hours prior to the meeting. E-mail "posting" does not constitute public notice under AS 44.62.310(e).

4. The meeting was held in the small private office away from the public eye thus denying the community the right to attend and be heard

the right to attend and be heard on an extremely controversial issue.

5. No official transcript or documentation was memorialized at this meeting further denying public access to the deliberative process of its elected officials.

Clerk's Office
Mar 14 1 16 PM '94

APPLICATION FOR RECALL PETITION SPONSORS
Date 3-7-94

As per Section 29.26.260 of the Alaska Statutes the individuals listed herein apply to act as petition sponsors in the recall of the following individual:

Sharon Richards-School Board Member

Sponsors Name Print Name Address Phone

(17 signers)

Application for Recall of Mark Begich

Pursuant to A.S. 29.26.260, the undersigned sponsors apply for a recall petition for assembly member Mark Begich for committing misconduct in office/failure to perform prescribed duties by:

1. Participating in an illegal meeting on Saturday 1/22/94, with Charles Wohlforth, Peggy Robinson-Wilson, Sharon Richards, Debbie Ossiander and Superintendent Robert Christal, in violation of AS44.62.310 (a),(b),&(c), AS44.62.312 (a), and AMC1.25.010.

2. Assemblyman Mark Begich personally requested the following placed on E mail:
    1. Sa 01/22/94 0200p 0300p Assembly/School Board Issues Meeting: Begich, Wohlforth, Richards, Robinson-Wilson, Ossiander, 207 W. Northern Lights Blvd, Suite 106.

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4. The meeting was held in the small private office away from the public eye thus denying the community the right to attend and be heard

on an extremely controversial issue.

5. No official transcript or documentation was memorialized at this meeting further denying public access to the deliberative process of its elected officials.

Clerk's Office
Mar 14 1__ PM '94

APPLICATION FOR RECALL PETITION SPONSORS
Date 9 March 94

As per Section 29.26.260 of the Alaska Statutes the individuals listed herein apply to act as petition sponsors in the recall of the following individual:

Mark Begich-Assemblyman

Sponsors Name Print Name Address Phone

(15 signers)

ANCHORAGE DAILY NEWS, Friday, March 3, 1995, Section B

City seeks to clarify petition ruling

By Peter Blumberg
Daily News reporter

Mayor Rick Mystrom said he was surprised when a state judge sternly rebuked the city last week for asking the court to rule on the legality of an alcohol tax.

In fact, the mayor said he's so confused about last Friday's ruling on the city's so-called "friendly lawsuit" against liquor tax sponsor Jim Crary that he plans to write a letter asking Reese to clarify when it's appropriate for the city to take legal questions about petitions to the courts.

After all, said the mayor and city attorney Mary Hughes, it was only a year ago that the city asked the same judge to rule on the legality of a recall petition and got a much different response.

In that case, instead of blasting the city for suing the petitioners and trampling on their constitutional rights, the judge said the city was right to seek the court's guidance. The petitioners alleged that four local politicians held an illegal meeting and the city wanted to know if the allegations qualified as grounds for a recall petition.

According to a transcript from the March 1994 hearing, Reese said he believed the city's decision to "file suit to find out what misconduct means ... is the proper procedure for them to have taken."

In the recall case, as in the Crary case, the city named the petitioners as defendants and sought what is called "declaratory judgment." In

both cases, the city wanted the judge to advise whether the issues in the petitions belonged on a citywide ballot.

The judge's remarks from last year's case give the city's legal staff confidence that the courts would be the proper place to clear up any doubts about the legality of Crary's tax proposal, the mayor said.

"We thought we were doing what Judge Reese had recommended we do," Mystrom said.

That assumption turned out to be wrong.

Reese said during Friday's hearing the city had no business suing its citizens for exercisisng their

Please see Page B-3, **PETITION**

PETITION: Surprised city officials to seek clarification on judge's ruling

Continued from Page B-1

right to petition. Crary had collected nearly 10,000 signatures to bring the question of a tax on alcohol before the electorate on the spring ballot.

"It is not the job of government to seek out citizens and file extensive lawsuits against them," said Reese, who declared that liquor taxes in general are legal and ordered the city to put Crary's proposal on the April 18 ballot.

So what changed between last March and last Friday?

Reese declined to comment, noting that the case is still pending because Friday's ruling was preliminary.

Allan Tesche, Crary's attorney, argued in court documents that there are important differences between last year's recall petition and this year's alcohol tax petition.

For one thing, the recall petition had not yet been widely circulated for signatures when the city sued its 14 sponsors. The judge was being asked in that case to make a decision that might undo the efforts of a small number of people, in contrast to the thousands of people who signed Crary's petition before the city sued him, Tesche argued.

Tesche also cast doubt on whether the city really needed a judge's advice on Crary's petition. Crary had ended up in court with the city last year when he sponsored an alcohol tax petition. At that time, Judge Reese issued a preliminary ruling that Crary probably would win a dispute over the legality of his tax. Reese ordered the city to put the tax proposal on the ballot, but voters turned it down.

During Friday's hearing, assistant city attorney Bill Greene at first said the city would remain neutral on Crary's proposal, that his sole concern was to avoid the "time-consuming and expensive" process of putting the initiative on the ballot if a liquor tax would later prove to be illegal.

But when the judge started siding with Crary, Greene shifted out of his neutral stance, saying that if the city were left to do as it saw fit, it would reject the petition and keep the tax proposal off the ballot.

Tesche said Thursday that Greene's change of position in open court "calls into question" whether the city was really neutral in the first place.

Before the decision to sue Crary, Mystrom said, his legal staff told him that if the city approved the petition and put the tax proposal on the ballot, the city likely would be sued by liquor industry opponents of the tax. If the city rejected the petition, it likely would be sued by Crary.

"In either case there would have been a suit and it would have been much more hostile than us doing it first," Mystrom said. "I feel much better about this issue now that it's cleared up."

The same cannot be said for the Citizens Opposing Senseless Taxation, an industry group whose lawyer wasn't permitted by Reese to formally join the lawsuit against Crary.

"I think not allowing an industry group or people concerned about the tax to participate is unfair," said Kevin Bruce, a spokesman for the industry group. He said the group might ask Reese to reconsider his decision barring the group from joining the suit.

Bruce added: "If we don't prevail at the ballot box, I think we'll end up back in court."

Mystrom said he came out against an alcohol retail tax while campaigning for mayor last spring and intends to stick with that position.

Mystrom had pushed for such a tax – to recover some of the cost of alcohol abuse – back when he was on the Anchorage Assembly in the early 1980s. However, he started thinking a couple of years ago that wholesale taxes are more fair to consumers and less burdensome to businesses. If the proposal now before voters called for a wholesale alcohol tax, he'd be supporting it, Mystrom said.

"I cannot support a retail tax, but I can tell you with certainty that I am not going to work against it," he said. "So I think this issue will be decided by voters on its own merits."

Supreme Court, U.S.
F I L E D
MAY 29 1997
CLERK

No. 96-1639

In The

Supreme Court of the United States

October Term, 1996

KAREN ELIZABETH DEMPSTER,

Petitioner,

v.

MUNICIPALITY OF ANCHORAGE; LEJANE FERGUSON, MUNICIPAL CLERK; WILLIAM A. GREENE, ASSISTANT MUNICIPAL ATTORNEY; AND JOHN DOE 1 AND JOHN DOE PARTIES,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

CLIFF JOHN GROH
Municipal Attorney's Office
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Counsel for Respondents

May 29, 1997

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

Should the United States Supreme Court accept an interlocutory appeal of a decision of a Circuit Court of Appeals denying an appeal of a District Court decision granting qualified immunity to individual defendants sued under 42 U.S.C. Section 1983?

LIST OF PARTIES

Respondents accept Petitioner's statement of the List of Parties.

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B. On the merits, the District Court was correct to grant qualified immunity to individual Defendants William A. Greene and Lejane Ferguson. 5

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OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

Respondents accept Petitioner's statement of the Opinions Below.

JURISDICTION

Respondents accept Petitioner's statement of Jurisdiction.

STATUTES OR OTHER PROVISIONS INVOLVED

Respondents accept Petitioner's statement of Constitutional Provisions and Statutes Involved.

STATEMENT OF THE CASE

Given the present procedural posture of the case, Respondents will confine themselves to correcting the inaccuracies in Petitioner's Statement of the Case in the Petition for a Writ of Certiorari. Petitioner has made a number of statements which are unsupported by the record, untrue, or both. These statements include:

1. The claim that a member of the Anchorage Municipal Assembly running for Mayor of Anchorage determined that an upcoming citizen advisory ballot issue "would bring out a large number of voters . . . unfavorable to his candidacy" (Petition, p. 9). This claim is

sheer speculation on Petitioner's part and has no support in the record below.

2. The statement that a "tumultuous school district action" was "taken against the weight of parent testimony and compromise . . . " (Petition, pp. 9-10). This statement has no support in the record below.

3. The claim that the notice of the meeting issued on January 21, 1994 was "statutorily deficient" (Petition, p. 10 n.1) was rejected in an Alaska Superior Court decision dated October 31, 1994. This decision held that the applications for recall petitions at issue in this case did not allege a meeting for purposes of the Alaska Open Meetings Act in effect at the time of the alleged meeting. This same decision held that the applications for recall petitions were legally insufficient under Alaska law and should be rejected by the Anchorage Municipal Clerk.

4. The claim that the State and Municipal Omsbudmen and other Anchorage Assembly Members all advised citizens supporting the advisory ballot that "recall was the only avenue to register their dissatisfaction . . . " (Petition, p. 10) is completely unsupported by the record.

5. The claims that the declaratory judgment action filed by the Municipality of Anchorage "derailed the application process and killed the petition" (Petition, p. 12) is Petitioner's conclusion, not a fact established by the record.

ARGUMENT

A. Existing law does not make a District Court's grant of qualified immunity immediately appealable as a matter of right, and there is no reason to expand the small class of District Court decisions that, though short of final judgment, are immediately appealable as a matter of right to include cases in which qualified immunity has been granted.

28 U.S.C. Section 1291 gives Courts of Appeals jurisdiction over "all final decisions" of District Courts, except those for which appeal is to be had to the United States Supreme Court. *Behrens v. Pelletier,* 516 U.S. ___, 116 S.Ct. 834, 838, 133 L.Ed.2d 773, 783 (1996). The District Court's granting of a Motion for Qualified Immunity as to two individual defendants, William A. Greene and Lejane Ferguson, did not "end[ ] the litigation on the merits" and thus did not meet one prong of the normal definition of a "final decision." *See Coopers & Lybrand v. Livesay,* 437 U.S. 463, 467, 98 S.Ct. 2454, 2457, 57 L.Ed.2d 351, 357 (1978), quoting *Catlin v. U.S.*, 324 U.S. 229, 233, 65 S.Ct. 631, 633, 89 L.Ed. 911, 916 (1945). Nor has Petitioner sought or received certification of the District Court's granting of qualified immunity as a final judgment under Federal Rule of Civil Procedure 54(b) and thus cannot claim jurisdiction via that route. *See Curtiss-Wright Corp. v. General Elec. Co.,* 446 U.S. 1, 7-8, 100 S.Ct. 1460, 1464-65, 64 L.Ed.2d 1, 11 (1980).

28 U.S.C. Section 1291 does not, however, bar review of all pre-judgment orders. This Court has described a "small class" of District Court decisions that, though short of final judgment, are immediately appealable

because they "finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate jurisdiction be deferred until the whole case is adjudicated." *Behrens v. Pelletier*, 516 U.S. at ___, 116 S.Ct. at 838, 133 L.Ed.2d at 783, quoting *Cohen v. Beneficial Industrial Loan Corporation*, 337 U.S. 541, 546, 69 S.Ct. 1221, 1225-26, 93 L.Ed. 1528, 1536 (1949).

Included in this "small class" of pre-judgment orders immediately appealable as a matter of right is a decision denying a claim of qualified immunity to the extent that the decision turns on an issue of law. *Behrens v. Pelletier*, 516 U.S. at ___, 116 S.Ct. at 838, 133 L.Ed.2d at 783-84. Petitioner asks this Court to grant interlocutory review so as to expand this "small class" of immediately appealable pre-judgment orders to include a District Court's grant of a claim of qualified immunity. There are overwhelming policy reasons to make immediately appealable a District Court's rejection of a claim of qualified immunity, and such reasons do not apply to a District Court's grant of qualified immunity.

The defense of qualified immunity was designed by this Court to give government officials a right to avoid both the burdens of trial and the burdens of such pre-trial matters as discovery. *Id.* at ___, 116 S.Ct. at 839, 133 L.Ed.2d at 784-85. This Court has repeatedly expressed concern of "the general costs of subjecting officials to the risks of trial – distraction of officials from their governmental duties, inhibition of discretionary action, and deterrence of able people from public service." *Mitchell v. Forsyth*, 472 U.S. 511, 526, 105 S.Ct. 2806, 2815, 86 L.Ed.2d

411, 425 (1985), quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 816, 102 S.Ct. 2727, 2737, 73 L.Ed.2d 396, 409 (1982). Referring to discovery and other pre-trial matters, the Court has observed that "[i]nquiries of this kind can be peculiarly disruptive of effective government." *Harlow v. Fitzgerald*, 457 U.S. at 817, 102 S.Ct. at 2737-38, 73 L.Ed.2d at 410 (footnote omitted).

These considerations clearly come into play when the question is whether to allow an immediate appeal of a denial of qualified immunity. They do not arise when the question is whether to carve out a whole new exception to the final-judgment rule by allowing an immediate appeal of a grant of qualified immunity. This Court should not go down that long road, particularly on this record.

B. On the merits, the District Court was correct to grant qualified immunity to individual Defendants William A. Greene and Lejane Ferguson.

There is another reason this Court should decline to grant this Writ of Certiorari: Respondents are likely to prevail on the merits. The qualified-immunity defense shields government agents from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. *Behrens v. Pelletier*, 516 U.S. at ___, 116 S.Ct. at 838, 133 L.Ed.2d at 783. It is telling that even after litigating this case through the District Court, the Court of Appeals, and now this Court, Petitioner cannot come up with even one case holding

that the conduct complained of or anything similar violates a right protected under 42 U.S.C. Section 1983.

CONCLUSION

For the foregoing reasons, Respondents request that the Court deny the Petition for a Writ of Certiorari.

Respectfully submitted,

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